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IN THE

Supreme Court of the United States

October Term,

No. 76-789

BARON EUGENE NOLL,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

Opinions Below 1

Jurisdiction 1

Questions Presented. 2

Constitutional Provisions Involved . .2

Statutes Involved. 4

Statement of Facts 5

Reasons For Granting the Writ. . . . 11

Conclusion 27

Appendix a1

CASE CITATIONS

Berry v. City of Chesapeake,
209 Va. 383, 164 S.E.2d 676 19

Hertz v. Woodmar, 218 U.S. 205,
54 L.Ed 1001, 305 S.Ct. 621 23

Hodge v. Commonwealth, 228 S.E.2d
692, 695. 15

Huvar v. Commonwealth, 212 Va. 661,
187 S.E.2d 177. . . . . 22, 25

Johnson v. Commonwealth, 211 Va. 815,
180 S.E.2d 661. 19

Martin v. Commonwealth, 195 Va. 1107,
81 S.E.2d 574 12

Merritt v. Commonwealth, 164 Va.
653, 180 S.E. 395 . . . . . 12, 13

Mullaney v. Wilbur, 421 U.S. 684,
95 S.Ct. 1881, 44 L.Ed.2d 508. . 15, 16

Price v. Commonwealth, 209 Va. 383,
164 S.E.2d 676 19

Ritter v. Commonwealth, 210 Va.
732, 173 S.E.2d 799. . . 22, 23, 25, 27

Snidow v. Snidow, 192 Va. 60,
63 S.E.2d 620. 23

Thacker v. Commonwealth, 134 Va.
767, 114 S.E. 504. 12

Williams v. Commonwealth, 212 Va.
818, 188 S.E.2d 79 26

CONSTITUTIONAL PROVISION

Amendment V to the United States
Constitution. 2

Amendment XIV to the United States
Constitution. 3

STATUTES

§18.1-268.3, Code of Virginia . . .4, 18

§18.1-268.4, Code of Virginia . . .5, 18

§18.1-21, Code of Virginia. 4

§18.1-16, Code of Virginia. 4

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

BARON EUGENE NOLL
Petitioner,

v.

COMMONWEALTH OF VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF VIRGINIA

Petitioner, Baron Eugene Noll, prays that a writ of certiorari issue to review the judgment of the Virginia Supreme Court rendered in these proceedings on September 13, 1976.

OPINIONS BELOW

The decision of the Virginia Supreme Court rejecting petitioner's appeal and refusing the Petition for Writ of Error and Supersedeas is included in the Appendix, infra.

JURISDICTION

The decision of the Virginia Supreme Court was entered on September 13, 1976. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether multiple convictions of, and sentences for, attempted murder of multiple occupants of a single dwelling house arising out of the arson of that building, without any evidence of specific intent to kill the occupants of that building, amounts to a deprivation of liberty without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Whether a conviction for possession of a "sawed-off" shotgun, "under circumstances indicating · · · preparation for the commission of a crime of violence", which conviction was not supported by the law and the evidence, constitutes a denial of due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Whether the refusal of the Virginia Supreme Court to follow its recent decisions and apply the doctrine of stare decisis denied the petitioner the right to due process and equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury,

except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 18.1-16 of the Code of Virginia 1950 (1960 Rep. Vol.):

§18.1-16. Attempts to commit capital offenses; how punished. - Every person who attempts to commit an offense which is punishable with death, shall be confined in the penitentiary not less than one nor more than twenty years, except that attempts to commit rape, other than rape not punishable with death, shall be punishable with death or, in the discretion of the jury or the court trying the case without a jury, by confinement in the penitentiary for life or for any term not less than three years.

Section 18.1-21 of the Code of Virginia 1950 (1975 Cumm. Supp.):

§18.1-21. Murder, first and second degree, defined. - Murder by poison, lying in wait, imprisonment, starving, or by any wilful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, abduction as defined in §18.1-38, arson, rape, robbery or burglary is murder of the first degree. All other murder is murder of the second degree.

Section 18.1-268.3 of the Code of Virginia 1950 (1975 Cumm. Supp.):

§18.1-268.3. Possession or use of "sawed-off" shotgun for offensive or aggressive purpose. -

Unlawful possession or use of a "sawed-off" shotgun for an offensive or aggressive purpose is hereby declared to be a crime punishable by imprisonment in the State penitentiary for a term of not less than ten years.

Section 18.1-268.4 of the Code of Virginia 1950 (1975 Cumm. Supp.):

§18.1-268.4. What constitutes offensive or aggressive purpose. - Possession or use of a "sawed-off" shotgun shall be presumed to be for an offensive or aggressive purpose:

. . .

(4) When the "sawed-off" shotgun is found in the possession of an individual under circumstances indicating his preparation to participate in a riot or civil disturbance or his preparation for the commission of a crime of violence.

STATEMENT OF FACTS

Petitioner, Baron Eugene Noll, was convicted by the Circuit Court of the City of Norfolk, Virginia, on September 24, 1975 of the following offenses alleged to have occurred on June 8, 1975: manufacture of a fire bomb, arson of a dwelling house and four separate charges of attempted murder of each of the persons who were in the dwelling house. He was further convicted of the following charges alleged to have occurred on June 13, 1975: possession of a "sawed-off" shotgun, possession of LSD and possession of marijuana. As a result of

these convictions Noll was sentenced to serve a term of life in the penitentiary on the arson conviction, twenty years in the penitentiary on each of the two attempted murder convictions and five years in the penitentiary on the conviction of manufacturing a fire bomb. Imposition of any sentencing on the remaining five convictions was suspended and Noll was placed on supervised probation for a period of ten years after his release from the penitentiary.

The evidence presented at trial established that on June 8, 1975, the petitioner, Noll, a 23 year old white male, was arrested in Norfolk, Virginia and charged with manufacturing of a fire bomb, arson in the nighttime of an occupied dwelling, and four counts of attempted murder, in connection with the early morning fire bombing and burning of the George Foeler residence at 8316 Nathan Avenue, Norfolk, Virginia. Also arrested and charged with these offenses were William Thor Anderson, Darrell B. Phinney, Donna Carol Simms and William Anthony Prasch, Jr. At the time of his arrest, Noll was a member of the United States Navy, stationed in Norfolk, Virginia, and lived with Anderson, Simms and another individual in an apartment at 316 East Ocean View Avenue in the City of Norfolk, Virginia.

The testimony of two alleged accomplices, William Thor Anderson, age 18, and Darrell B. Phinney, age 22, was that in the early morning hours of June 8, 1975, they along with Simms, Prasch and Noll, participated in the fire bombing of the Foeler residence. The accomplice, Anderson, testified that on June 7, 1975, he, Simms and Noll were together at their apartment, and that at about 3:30 or 4:00 p.m. he (Anderson)

and Simms took a "hit of acid", sometimes referred to as LSD (Tr. 13). Thereafter they remained at their apartment until approximately 8:00 o'clock p.m., when they went to the Nansemond Hotel, where they remained together until about 11:30 p.m., when they returned to the offices of the motel-apartment building where they lived (Tr. 14). They remained in the office of the motel-apartment building until approximately 12:15 to 12:30 a.m., when the accomplices, Prasch and Phinney, came to the office to see Noll. Noll then went out of the office with Prasch and Phinney and had a conversation (Tr. 14).

Phinney testified that he had taken "two hits of blotter acid" at about 11:15 p.m., prior to going to the motel-apartment office to see Noll (Tr. 130, 133). Phinney stated that during the conversation he had with Noll outside the office, he asked Noll if he (Noll) still wanted to get even with that "chick", who had "ripped him off", that night like he had planned (Tr. 106, 107, 145). The "chick" referred to was Evelyn Pierce, stepdaughter of George Foeler, who resided at the Foeler residence at 8316 Nathan Avenue, Norfolk, Virginia. Noll had previously advised Phinney that he wanted to get back at Evelyn Pierce for "ripping him off", stealing, a stereo and some tapes from him.

Noll then asked Phinney if he knew anything about making fire bombs, and Phinney replied that he could make them and that he had some empty bottles and rags at his apartment that could be used (Tr. 107, 108). Phinney testified that Noll then started setting up the plan "how he was going to get back at Evelyn by going down to the house and, you know,

throwing them in the windows" (Tr. 107, 108). Noll sent Prasch to get some gasoline at a service station across from the motel (Tr. 108, 109). Prasch went to get the gas and Noll, Phinney, Anderson and Simms took Noll's car, picked up Prasch, and went to Phinney's apartment on 25th Bay Street, in Norfolk, Virginia, where Phinney got the wine bottles and rags (Tr. 109).

They then drove past the Foeler residence on Nathan Avenue, went around the block, parked the car, and Noll and Phinney walked back to the house to determine which windows were to be targets for the fire bombs (Tr. 111). They then returned to the car and Noll explained to everyone what was going to happen (Tr. 22).

Noll then drove to a motel parking lot on Little Creek Road, where Phinney got out of the car and made three fire bombs (Tr. 27, 112). Phinney passed each of these to petitioner, Noll who looked at them to see if he approved (Tr. 27, 112). The group then drove back to the Foeler house and again parked around the corner (Tr. 28, 113). The plan was that Noll was to remain in the car, and when Prasch, Phinney and Anderson were in position at the Foeler house, Noll was to step on his brakes if there was no one coming; upon seeing the brake light Donna Simms, who was standing on the corner, was to turn on a flashlight, and upon seeing the flashlight signal, Prasch, Anderson and Phinney were to throw their fire bombs through windows of the Foeler residence (Tr. 113). Noll remained in the car at all times. When the signal was given, Prasch and Phinney lit their fire bombs and threw them through windows of the Foeler residence (Tr. 113). Anderson testified that

as he was to throw his fire bome he "Flashed on to what I was doing" (Tr. 129), meaning that it dawned on him as to what he was doing for the first time, and he handed his fire bomb to Prasch and ran back to the car (Tr. 30). Shortly thereafter, Prasch and Phinney returned to the car, and Noll drove Prasch and Phinney back to Ocean View and dropped them off at the Nansemond Hotel. Noll, Simms and Anderson then went back to their apartment and went to bed. Later that evening each of these individuals were arrested and charged with the offenses of manufacturing a fire bomb, arson in the nighttime, and four counts of attempted murder.

Of the three fire bombs that were thrown at the house, only one fire bomb, which landed in the living room, actually exploded inside the house causing a fire in the living room (Tr. 94, 95); one fire bomb hit on the outside of the house causing the shingles to catch fire (Tr. 95); the third fire bomb landed in a bedroom on the north side of the house, but was smothered out and did not explode (Tr. 92).

At the time of the fire bombing, Evelyn Pierce was spending the night with a friend and was not home (Tr. 83), however, the house was occupied at that time by George Foeler, his wife, and two children (Tr. 79). Mrs. Foeler and one of the children sustained burn injuries as a result of the fire.

On June 13, 1975, five days after the fire bombing and while Noll was in jail pursuant to his arrest on June 8, 1975 on the charges arising out of the fire bombing, the police executed a search of a storage room adjacent to Noll's apartment

at 316 East Ocean View Avenue, Norfolk, Virginia. The search, which was pursuant to a permission to search executed by the owner of the motel-apartment building where Noll resided, resulted in the discovery of a paper bag containing LSD and marijuana in the storage room adjacent to his apartment. A "sawed-off" shotgun was discovered near the bag of drugs. The Petitioner was then charged with possession of a "sawed-off" shotgun and possession of marijuana and LSD with intent to distribute.

A check for fingerprints revealed no fingerprints on the "sawed-off" shotgun. Noll's Number 8 fingerprint was found on a cold cream jar with a butterfly on it, containing one quarter ounce of marijuana, which was located in the paper bag with other drugs. The storage room where the drugs and shotgun were found was not rented to Noll and he did not have a key to it. The storage area was generally kept locked, and while there was an entrance to the storage room from Noll's apartment, that door had latch type locks on both sides, and thus the storage room was not accessible from Noll's apartment.

On the basis of the foregoing the petitioner, Noll, was convicted of each of the charges as aforesaid.

At the trial of this matter, counsel for the petitioner moved to strike the Commonwealth's evidence at the conclusion of the Commonwealth's evidence (Tr. 202), and renewed his motion to strike at the conclusion of all of the evidence (Tr. 251), raising the substantial questions sought to be reviewed herein. Thereafter the same questions were raised for the Supreme Court of Virginia as indicated by the Notice of Appeal and Assignments of Error reproduced in the Appendix (a3-5).

ARGUMENT

REASONS FOR GRANTING THE WRIT

1. The petitioner was denied his right to due process and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States by reason of his conviction of four separate offenses of attempted murder of the occupants of a single dwelling house where the charges of attempted murder were based on the arson of the dwelling house and were unsupported by any evidence of specific intent to kill the occupants of the dwelling.

It is respectfully submitted by Petitioner that, with regard to the four charges of attempted murder, the Trial Court erred in ruling that there was sufficient evidence of specific intent to kill the occupants of the dwelling to support multiple convictions of attempted murder. It is further submitted that the single act of arson, while it may be sufficient to support one conviction of attempted murder, if intent be proven, is certainly not sufficient to support convictions of attempted murder of each and every occupant of the building, and that separate convictions of, and sentences for, attempted murder of each of the occupants of a single dwelling house arising out of the arson of that building amounts to deprivation of liberty without due process of law.

It is clear that an attempt to commit a crime consists of two elements:

(1) The intent to commit the criminal act; and (2) a direct, ineffectual act directed toward the accomplishment of the desired result, but falling short of the execution of the ultimate design. Merritt v. Commonwealth, 164 Va. 653, 180 S.E. 395; Thacker v. Commonwealth, 134 Va. 767, 114 S.E. 504; Martin v. Commonwealth, 195 Va. 1107, 81 S.E.2d 574.

As the Supreme Court of Virginia stated in Merritt, supra, 180 S.E. at 398, quoting with approval from Bishop On Criminal Law, (9th Ed.) Vol. 1, pp. 521-522:

> "Where the substantive crime intended requires a specific intent, though this intent does not in the same sense as in the other case aggravate what is done, still it adds a culpability which mere general malevolence could not give. So that the indictable attempt exists only when the act, short of the substantive crime, proceeds from the specific intent do do the entire evil thing, thus imparting to so much as is done a special culpability. When we say that a man attempted to do a given wrong, we mean that he intended to do it specifically; and proceeded in a certain way in the doing. The intent in the mind covers the thing in full; the act covers it only in part.
>
> . . . To commit murder, one need not intend to take life; but to be guilty of an attempt to murder, he must so intend. It is not sufficient that his act, had it proven fatal, would have been murder."

The Court went on to state in Merritt, supra, 180 S.E. at 399:

> "The intent is the purpose formed in a man's mind, and is usually proved by his conduct, sometimes by his statements; the necessary intent constituting one element in an attempt is the intent in fact, as distinguished from an intent in law. From the act alleged, the law infers a general evil intent, on the principle that a man intends the probable and necessary consequences of his act. The act charged here in an assault. In order to raise this assault to a more substantive crime, it must be done with a specific intent to take life. This intent cannot be inferred from the act alleged."

While it is true that a man is presumed to have intended the immediate, direct and necessary consequences of his voluntary actions, and while it is further true that intent may be shown by circumstances, it is also true that a person's statements and expressions of mind can negate any evil intent.

It is clear in the present case that neither the petitioner, Noll, nor any of the alleged accomplices intended to commit murder or to inflict injuries on anyone. The Commonwealth's witness, Anderson, an accomplice, testified that, immediately after the fire bombing Noll stated that "he said that he hoped nobody got hurt" (Tr. 32). Anderson went on to testify that "I was just hoping that nobody was

going to get - nobody had gotten hurt" (Tr. 63).

In addition, the Commonwealth's witness, Darrell Phinney, an accomplice, testified on cross-examination as follows:

"BY MR. SACKS:

Q I would ask you, sir, it is a fact that you didn't intend to kill anybody, did you?

A No. I did not.

Q To you knowledge Mr. Prasch didn't intend to kill anybody?

A Nobody wanted to kill nobody.

Q You've told us in every detail about how it was planned and who planned it and how it was carried out. Not a single person said anything about harming anybody, did they?

A No, they did not.

Q Would you go so far as to say that the intention was not to harm anybody but just to scare?

A That's it. That was the purpose of it was to scare." (Tr. 124) (Emphasis added)

Phinney's testimony is corroborated by a letter he had written to Noll shortly after the alleged offenses, wherein he stated, among other things, "because we didn't try to kill anyone but to scare the girl" (Tr. 126, Exhibit D-1). Phinney went

on to testify that nobody intended to hurt anybody much less kill anybody (Tr. 126-127). In response to questioning by the Court, Phinney testified that he didn't think there was anybody in the house; that he figured that it being Saturday night, they were gone or something; that he figured nobody was home (Tr. 117).

Thus, the only direct evidence with regard to the intent to commit murder, is that such an intent never existed. It is clear from the testimony of Anderson and Phinney, that the intent was merely to scare Evelyn Pierce and that at no time did Noll or any of the other persons involved intend to murder anyone.

It is further submitted that it is clearly unconstitutional to presume from the fact that the fire bombing occurred that Noll intended to kill every person in the residence at the time of the fire bombing.

The Supreme Court of Virginia, in light of this Court's recent ruling in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), in discussing the use of presumptions as a procedural device to shift the burden of producing evidence, stated in the recent case of Hodge v. Commonwealth, 228 S.E.2d 692, 695, (1976) that:

> "But neither the Due Process Clause nor Mullaney prohibits the use of presumptions or inferences as procedural devices to shift to the accused the burden of producing some evidence contesting the otherwise presumed or inferred fact. These devices, however must satisfy certain

> due process requirements, and the ultimate burden of proof beyond a reasonable doubt must remain upon the prosecution. Mullaney, 421 U.S. at 702-03, n. 31, 95 S. Ct. 1881. In this contest, due process requirements are satisfied if the evidence necessary to invoke the presumption or inference is sufficient for a rational juror to find the presumed or inferred fact beyond a reasonable doubt."

In the instant, case the Commonwealth clearly did not sustain the ultimate burden of proof. The only manner in which a specific intent to kill can be gleaned from the facts of this particular case is from the fact that the arson occurred. Clearly the evidence brought forth on cross-examination of the Commonwealth's witnesses established that no one involved in the arson, particularly Noll, intended to hurt or kill any of the persons inside the dwelling at the time of the arson.

It is also Petitioner's contention that the single act of arson, while it may be sufficient to support one conviction of attempted murder, it is certainly not sufficient to support convictions of attempted murder of each and every occupant of the building. If it be proven that a single act constituted sufficient evidence to convict a defendant of attempted murder, such act would not support multiple convictions for the attempted murders of other people. If a bomb were thrown into a stadium containing 80,000 people, with the intent to murder one individual, and the perpetrator of the act were convicted of attempted murder of that individual,

surely that act would not support a conviction for the attempted murder of the remaining 79,999 people present in the stadium. In the instant case, of course, it is denied that there was any intent to commit murder or to harm anyone. While there were four people present in the house at the time of the occurrence, only two of these individuals received injuries.

It is therefore submitted that the evidence fails to sustain a conviction of attempted murder of each of the occupants of a single dwelling arising out of the arson of that building, and that accordingly Petitioner has been denied his right to due process and equal protection of the law.

2. Petitioner was denied due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States where his conviction of possession of a sawed-off shotgun "under circumstances indicating . . . preparation for the commission of a crime of violence" was not supported by the law and the evidence.

It is petitioner's contention that the record in the Trial Court is void of sufficient credible evidence to support a finding that he, Noll, was in possession of a "sawed-off" shotgun under circumstances indicating prepration for the commission of a crime of violence in violation of Sections 18.1-268.3 and 18.1-268.4(4) of the Code of Virginia.

Section 18.1-268.3 of the Code of Virginia provides in pertinent part that:

> "Unlawful possession or use of a 'sawed-off' shotgun for an offensive or aggressive purpose is hereby declared to be a crime . . . . "

Code Section 18.1-268.4 defines what constitutes possession or use of a "sawed-off" shotgun for "offensive or aggressive purposes", and states that:

> §18.1-268.4. What constitutes offensive or aggressive purpose. - Possession or use of a "sawed-off" shotgun shall be presumed

to be for an offensive or aggressive purpose:

(4) When the "sawed-off" shotgun is found in the possession of an individual under circumstances indicating his preparation to participate in a riot or civil disturbance or his preparation for the commission of a crime of violence. (1968, c. 661.)

At the trial of this case, the Commonwealth's Attorney advised the Court that he was relying on these specific Code Sections and particularly sub-paragraph 4 of Code Section 18.1-268.4, in establishing Noll's guilt with regard to the charge of possession of a "sawed-off" shotgun.

In the construction of criminal statutes, Virginia law requires that they be strictly construed in favor of the defendant and against the Commonwealth, and that such statutes cannot be extended by construction or implications to embrace cases which are not clearly within their letter and spirit. Price v. Commonwealth, 209 Va. 383, 164 S.E.2d 676; Berry v. City of Chesapeake, 209 Va. 525, 165 S.E.2d 291; Johnson v. Commonwealth, 211 Va. 815, 180 S.E.2d 661.

A strict interpretation of Code Sections 18.1-268.3 and 18.1-268.4(4) would make unlawful the situation where a "sawed-off" shotgun is found in the possession of an individual prior to the commission of a crime of violence under circumstances indicating that individual's preparation to participate in the commission of a crime of violence. In the present case, however,

the gun was not even located until June 13, 1975, some five days after the commission of the crime, when it was discovered during the course of a search of a storage room adjacent to Noll's apartment (Tr. 188, 193, Exhibit C-25). Thus, the gun could not have possibly been found under circumstances indicating preparation for participation in a riot or civil disturbance or preparation for the commission of a crime of violence.

In addition, the evidence clearly establishes that the "sawed-off" shotgun was never possessed under circumstances which would indicate Noll's preparation to participate in a riot or his preparation for the commission of a crime of violence. The shotgun was not used in the commission of the arson. All the evidence showed in great detail, the planning of how the crime was to be accomplished, including who was going to throw what bomb; nobody talked about the use of a gun prior to or subsequent to the commission of the crime; the shotgun was merely in the car on the night of the offense.

The only evidence presented with regard to the shotgun was Phinney's statement that he saw the gun in the car that night (Tr. 118); there was no evidence that the gun was used in the offense or that the weapon was ever handled or removed from the car. Anderson merely testified that the shotgun had been in their apartment before (Tr. 35). He did not even testify that the gun was in the car on the night of the offense.

It is therefore respectfully submitted that the evidence does not support a finding that the "sawed-off" shotgun was

found in the possession of Noll at a time and under circumstances indicating his preparation to participate in a riot or civil disturbance or his preparation for the commission of a crime of violence. At the time the shotgun was located, the crime had been committed and the shotgun had not been utilized in any way in the commission of the crime.

Thus, it is submitted that Noll was effectively denied due process of law in violation of his constitutional rights pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States upon his conviction of possession of a "sawed-off" shotgun under circumstances indicating preparation for the commission of a crime of violence.

3. The refusal of the Virginia Supreme Court to follow its prior decisions and apply the doctrine of stare decisis denied petitioner the right to due process and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

It is petitioner's contention that the Virginia Supreme Court refused to follow its prior decisions establishing the requirements necessary to support a conviction of possession of narcotics, and that, accordingly, petitioner was denied the right to due process and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

In the case of Ritter v. Commonwealth, 210 Va. 732, 741, 173 S.E.2d 799, 805-806 (1970); the Supreme Court of Virginia stated:

> "In order to convict a defendant of 'possession' of a narcotic drug, within the meaning of Virginia's Uniform Narcotic Drug Act, it generally is necessary to show that defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. Physical possession giving the defendant 'immediate and exclusive control' is sufficient. However, the possession need not always be exclusive. The defendant may share it with one or more. The duration of the possession is immaterial and need not always be actual possession. The defendant may be shown to have had constructive possession by establishing that the drugs involved were subject to his dominion or control." See also Crisman v. Commonwealth, 197 Va. 17, 87 S.E.2d 796 (1955).

While the Virginia Uniform Narcotic Drug Act has now been revised and is known as the Drug Control Act of Virginia, which became effective on June 26, 1970, the requirements for a conviction of possession of a narcotic drug have not changed. Huvar v. Commonwealth, 212 Va. 667, 187 S.E.2d 177 (1972). In Huvar, supra, the Supreme Court of Virginia held that the mere presence of an individual, who was present along with other persons, at a location where drugs or narcotics were found, and

who had the appearance of one who may have been using drugs, was not sufficient to convict him of the actual or constructive possession of the drugs which were found there.

It is the petitioner's contention that the Trial Court and Supreme Court of Virginia did not apply the evidentiary requisites set forth in Ritter, supra, to the factual situation presented by the instant case. It is petitioner's further contention that the failure of the Court to apply those evidentiary requirements with regard to possession of a narcotic drug, as set forth in Ritter, supra, and thereby apply the doctrine of stare decisis, effectively denied the petitioner his right to due process and equal protection of the law.

The doctrine of stare decisis and the application of the doctrine is so well recognized and established that little comment be made. Generally speaking, determination of a point of law by a court will be followed by a court of the same or lower rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case. Hertz v. Woodman, 218 U.S. 205, 54 L. Ed. 1001, 30 S. Ct. 621; Snidow v. Snidow, 192 Va. 60, 63 S.E.2d 620. The doctrine is not without application in cases involving penal statutes.

In the instant case, the marijuana and LSD which formed the basis for the charges and subsequent convictions of possession of those drugs, was not discovered by the Commonwealth until five days after the petitioner's arrest.

The evidence presented at trial established that on June 13, 1975, while executing a search warrant in a storage room in the motel-apartment complex where Noll resided, the Commonwealth discovered a brown paper bag containing the following:

> "One one-pound block of substance suspected to be marijuana; one brown pill container containing four suspected hits of LSD; three plastic bags of suspected marijuana; four plastic bars of suspected marijuana stems; and a butterfly, appeared to be a cold cream jar containing one-quarter ounce of marijuana, suspected marijuana; and one marijuana type smoking pipe." (Tr. 188)

Chemical analysis of the substances confirmed that they were marijuana and LSD.

The paper bag containing the drugs was found on the floor of the storeroom in the motel-apartment complex where Noll lived. The testimony established that there was an entrance to the storage room from the kitchen of Noll's apartment, however, that door was normally locked with a latch lock on both sides of the door (Tr. 175). In addition, there was another entrance to the storage area located in the hallway of the apartment building, under the stairs in an area open to the tenants and public (Tr. 176). The storage area was used by the owner of the premises, William Martin, for his motel supplies, furniture and other odds and ends. The storage area was not rented to Noll, and Noll could not get into the storage area unless he "busted the latch off (Tr. 173), and Martin could not recall

the latch having been knocked off (Tr. 175). The owner of the premises used the entrance under the steps for entering and leaving the storage room (Tr. 173). This entrance was kept locked with the exception of those times when Martin was going in and out and working at the motel (Tr. 176, 177). Martin had a key to the lock on the storage room entrance (Tr. 174), and Donna Simms, who helped Martin clean up and did work around the motel-apartment complex, also had a key to the storage room entrance and had access to the storage room in June, prior to the time the drugs were discovered (Tr. 183, 184). Noll did not have a key to the storage room (Tr. 183).

Martin further testified that while the storage room is not open for the use of his tenants, that on those occasions when he was on the premises and left the door unlocked, which occurred on numerous occasions, "anybody could have went in and out of there" (Tr. 185).

It is thus apparent that numerous other persons had the same or equal access or opportunity of possession of the narcotics found in the paper bag in the storage room. See Ritter v. Commonwealth, supra, and Huvar v. Commonwealth, supra.

It is submitted that in the instant case there was no evidence introduced at trial which would establish that Noll ever had exclusive or actual possession of the narcotics. It is true that the evidence estabiished that there was a butterfly jar, which was a cold cream jar, containing one-quarter ounce of marijuana, found in the bag among the other drugs, which jar contained a fingerprint identified as Noll's Number 8 finger (Tr. 193). It is submitted,

however, that this does not establish, beyond a reasonable doubt, that Noll possessed the butterfly jar at a time when it contained narcotics, nor does it establish that if the marijuana was present in the jar at a time when Noll touched it that he was aware of the presence and character of the substance.

As the Supreme Court of Virginia recently stated in Williams v. Commonwealth, 212 Va. 818, 188 S.E.2 79:

> "Proof of fingerprints on a television set that had been displayed in a showroom does not exclude a reasonable hypothesis that the prints were left at a time other than the time when the crime was committed. Since the evidence fails to exclude a reasonable hypothesis of innocence, it is insufficient to support the conviction."

The same reasoning would apply in the instant case where the only evidence was that the defendant's fingerprint was found on a butterfly jar, which was described as a cold cream jar, with a top that screws on and off (Tr. 194). Detective Hazelette, who testified for the Commonwealth, admitted that there was nothing on the jar pertaining to ownership other than the fingerprint, which may or may not mean ownership (Tr. 95). There was absolutely no evidence to establish that Noll touched the jar at a time when it contained narcotics or that he ever possessed any of these narcotics, which were not found until five days after his arrest.

It is therefore the petitioner's contention that the evidence does not comply with the requirements set forth by the Virginia Supreme Court in Ritter v. Commonwealth, supra, and that, accordingly, the law and the evidence does not support petitioner's conviction of the charges of possession of marijuana and LSD.

CONCLUSION

Petitioner respectfully requests that this Court grant a writ of certiorari for the above reasons.

Respectfully submitted,

BARON EUGENE NOLL

By /s/ Stanley E. Sacks
Stanley E. Sacks,
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Stanley E. Sacks, counsel for petitioner in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 8th day of December, 1976, I mailed three copies of the foregoing Petition for Writ of Certiorari to Joseph H. Campbell, Commonwealth's Attorney, City of Norfolk, Suite 600, 800 E. City Hall Avenue, Norfolk, Virginia 23510, counsel of record for respondent.

Stanley E. Sacks
Stanley E. Sacks

APPENDIX

APPENDICES
INDEX

Page

APPENDIX A
Memorandum Opinion of the
Supreme Court of Virginia. . . .a1, a2

APPENDIX B
Notice of Appeal and Assign-
ments of Error. a3-a5

APPENDIX A

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON MONDAY THE 13TH DAY OF SEPTEMBER, 1976.

The petition of Baron Eugene Noll for a writ of error and supersedeas to judgments rendered by the Circuit Court of the City of Norfolk on the 6th day of January, 1976, in prosecutions by the Commonwealth against the said petitioner for felonies and a misdemeanor (Indictments Nos. One through Nine), having been maturely considered and a transcript of the record of the judgments aforesaid seen and inspected, the court being of the opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgments of the

said circuit court.

Record No. 760581

A Copy,

Teste:

Howard G. Turner,
Clerk

By:
/S/ Richard R. Buriak
Deputy Clerk

APPENDIX B

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

COMMONWEALTH OF VIRGINIA *

v. *

BARON NOLL, *

Defendant. *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Pursuant to the provisions of the Rules of the Supreme Court of Virginia, the defendant, Baron Noll, hereby files Notice of his intention to appeal from a judgment of the Circuit Court of the City of Norfolk, Virginia, Judge William Moultrie Guerry presiding, of January 6, 1976, finding him guilty on nine (9) indictments charging him with four (4) attempted murders, arson, manufacturing of a fire bomb, possession of a sawed-off shotgun, possession of LSD, and possession of marijuana, and sentencing him to the following confinements: life in the penitentiary on the arson conviction, 20 years in the penitentiary on each of two of the attempted murder convictions, five years in the penitentiary on his conviction of manufacturing a fire bomb, and suspending imposition of any sentence on the remaining five convictions and placing the defendant on supervised probation for a period of ten years after his release from the penitentiary. The transcript of the incidents of the trial will be filed within the time limits prescribed by statute. The errors assigned are as follows:

1. The Court erred in overruling defendant's Motion To Strike The Evidence

as to each of the charges at the conclusion of the Commonwealth's case, and at the conclusion of all the evidence.

2. The Court erred in overruling the motion of the defendant to set aside the judgment of the Court as to each conviction, as being contrary to the law and evidence and without sufficient evidence to support it.

3. The Court erred in finding the defendant guilty on each of four (4) charges of attempted murder when there was only one overt act, and thus a conviction on one (1) charge of attempted murder barred a conviction on the remaining three (3) charges.

4. The Court erred in finding the defendant guilty on each of the four (4) charges of attempted murder as there was no evidence establishing the intent to commit murder.

5. Convictions of the defendant of the multiple charges of attempted murder based on one act, is a deprivation of defendant's Constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States as having deprived him of liberty without due process of law.

6. The Court erred in finding the defendant guilty of possession of a sawed-off shotgun for agressive purposes as there was no evidence that the defendant possessed the said sawed-off shotgun under circumstances indicating preparation for use in the commission of a crime of violence.

7. The Court erred in overruling defendant's Motion For A Mistrial as to each of the charges against the defendant.

8. The Court erred in admitting into evidence certain evidence offered by the Commonwealth and objected to by the defendant.

9. The Court erred in refusing to admit into evidence certain evidence offered by the defenant.

10. There was insufficient evidence to support a conviction of the defendant as to any of the charges against him.

11. The conviction of the defendant on each of the charges was contrary to the law and the evidence.

BARON NOLL

By /S/ Stanley E. Sacks
Of Counsel

SACKS, SACKS & TAVSS
405 F & M National Bank Bldg.
Norfolk, Virginia 23514

I certify that I ~~mailed~~ delivered a true copy of the foregoing pleading to each counsel of record on the 2nd day of Feb. 76.

/S/ Stanley E. Sacks

Of Attorneys for D.d.

Supreme Court, U. S.
FILED
MAR 1 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-789

BARON EUGENE NOLL,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

ANTHONY F. TROY
Attorney General of Virginia

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Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT

I. The Evidence Was Sufficient To Support The Judgments Of The Trial Court Convicting Petitioner Of Four Separate Charges Of Attempted Murder Of The Occupants Of A Dwelling House, Which Charges Arose From The Firebombing Of That House. 2

II. The Evidence Was Sufficient To Sustain Petitioner's Conviction Of Possession Of A Sawed-Off Shotgun Under Circumtances Indicating Preparation For The Commission Of A Crime Of Violence. 5

III. The Evidence Was Sufficient To Sustain The Convictions Of Possession Of Marijuana And LSD, And, In This Context, The Supreme Court Of Virginia Followed Its Own Decisions And Applied The Doctrine Of *Stare Decisis*. 8

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF CITATIONS

Cases	Page
Avent v. Commonwealth, 209 Va. 474, 164 S.E.2d 655 (1968)	11
Banovitch v. Commonwealth, 196 Va. 210, 83 S.E.2d 369 (1954)	3
Carter v. Commonwealth, 212 Va. 665, 187 S.E.2d 203 (1972)	7
Chittum v. Commonwealth, 211 Va. 12, 174 S.E.2d 779 (1970)	4
Epps v. Commonwealth, 216 Va. 150, 216 S.E.2d 64 (1975)	4
Ford v. Commonwealth, 215 Va. 308, 208 S.E.2d 921 (1974)	8
Grayson v. Harris, 267 U.S. 352, 69 L.Ed. 652, 45 S.Ct. 317 (1925)	3
Huvar v. Commonwealth, 212 Va. 667, 187 S.E.2d 177 (1972)	9
Merritt v. Commonwealth, 164 Va. 653, 180 S.E. 395 (1935)	3
People v. Neal, 98 Cal.App.2d 668, 218 P.2d 556 (1950)	5
Ritter v. Commonwealth, 210 Va. 732, 173 S.E.2d 799 (1970)	9
Thayer v. Spratt, 189 U.S. 346, 47 L.Ed. 845, 23 S.Ct. 576 (1903)	3
Williams v. Commonwealth, 212 Va. 818, 188 S.E.2d 79 (1972)	10, 11

Statutes

§ 18.1-268.3, Code of Virginia (1950), as amended	6
§ 18.1-268.4, Code of Virginia (1950), as amended	6, 7

In The

Supreme Court of the United States

October Term, 1976

No. 76-789

BARON EUGENE NOLL,

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v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on September 13, 1976, refusing a Writ of Error and Supersedeas, not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia is not reported as it was a refusal of the writ of error and supersedeas without opinion and it is contained in the Appendix to the Petition for a Writ of Certiorari as Appendix A.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient on the element of specific intent to sustain four convictions for attempted murder of the occupants of a firebombed dwelling house.

2. Whether the evidence was sufficient to sustain the conviction of possession of a sawed-off shotgun "under circumstances indicating . . . preparation for the commission of a crime of violence."

3. Whether the evidence was sufficient to sustain the convictions for possession of drugs, and, in this context, did the Supreme Court of Virginia refuse to follow its own decisions and to apply the doctrine of *stare decisis* and thereby deny petitioner due process and equal protection of the law.

STATUTES INVOLVED

The relevant constitutional and statutory provisions are set forth in full in the Petition for a Writ of Certiorari at pages 2 through 5.

STATEMENT OF THE CASE

Petitioner's statement of the case and statement of facts are substantially correct and are hereby adopted.

ARGUMENT

I.

The Evidence Was Sufficient To Support The Judgments Of The Trial Court Convicting Petitioner Of Four Separate Charges Of Attempted Murder Of The Occupants Of A Dwelling House, Which Charges Arose From The Firebombing Of That House.

The petitioner's argument constitutes an attack on the sufficiency of the evidence which does not rise to the level

of a constitutional question before this Honorable Court. *Thayer* v. *Spratt*, 189 U.S. 346, 47 L.Ed. 845, 23 S.Ct. 576 (1903); *Grayson* v. *Harris*, 267 U.S. 352, 69 L.Ed. 652, 45 S.Ct. 317 (1925). Petitioner is attempting to convert this assignment of error into a Federal question by asserting that the convictions for attempted murder are devoid of evidentiary support for the element of specific intent to kill the four occupants of the dwelling.

The Commonwealth submits that there was ample evidence to support the finding of requisite specific intent, which "may, like any other fact, be shown by circumstances. Intent is a state of mind which can be evidenced by the words or conduct of the person who is claimed to have entertained it." *Banovitch* v. *Commonwealth*, 196 Va. 210, 216, 83 S.E.2d 369, 373 (1954); See also *Merritt* v. *Commonwealth*, 164 Va. 653, 180 S.E. 395 (1935).

The record reveals that the petitioner believed that he had been "ripped off" by one Evelyn Pierce, and he wanted to get even with her. (Tr. at 26, 106-107, 146). The petitioner solicited the aid of several friends to make firebombs and to bomb the home of Evelyn Pierce. (Tr. at 107-108). Prior to preparing the firebombs, the petitioner and an accomplice walked by the house to determine which windows were to be targets for the firebombs. (Tr. at 111). *Three* bombs were subsequently prepared, and petitioner instructed his accomplices to toss them into the home at *three different locations*. One firebomb was to be hurled through the front window, another into a side window, and a third was to be thrown into the middle of the one-story house. (Tr. at 23, 25, 67, 111). On signal from petitioner, the bombs were ignited and thrown.

Evelyn Pierce's stepfather, George Foeller, was awakened by his wife's screams and he immediately saw "sparks around

the bedroom" and a small shag carpet on fire. As he carried the burning carpet out of the house, he observed the living room "completely ablaze" and yelled for the family "to get out of the house." (Tr. at 80). As a result of the fire, Mr. Foeller's four-year-old son suffered burns on his face and both arms and his wife was "burned severely—arms, hands, feet, shoulders, completely over her face." (Tr. at 89). Mr. Foeller and a stepson who was also in the residence managed to escape uninjured, but the fire left the living room "totally burned out" and there was "heavy burn damage throughout the entire building." (Tr. at 92). The firebomb thrown into the north bedroom failed to explode and "smothered out," leaving only slight scorching. There were, however, three separate fires in the home. (Tr. at 95).

The record also reflects that after the attack on the home had been completed, petitioner said that he hoped the girl [Evelyn Pierce] was home (Tr. at 37) and he asked, "Did they [the firebombs] all go in the house?" (Tr. at 115).

Notwithstanding the after-the-fact disclaimers by the perpetrators of any actual intent to kill anyone and their assertions that they had only intended to "scare" Miss Pierce, their heinous acts speak louder than their self-serving and after-the-fact declarations.

Specific intent can be inferred from the totality of the circumstances and the conduct of the parties. *Chittum* v. *Commonwealth,* 211 Va. 12, 174 S.E.2d 779 (1970); *Epps* v. *Commonwealth,* 216 Va. 150, 216 S.E.2d 64 (1975). It is abundantly clear how the trial judge, who sat as trier of fact without a jury, could have and did find specific intent to kill from the nighttime multiple firebombing of the one-story single dwelling, which acts were motivated by a desire for revenge.

The petitioner also argues in his petition for a writ of certiorari that while the "single act of arson" may be sufficient to support one conviction of attempted murder, "it is certainly not sufficient to support convictions for attempted murder of each and every occupant" of the house. (See Petition at 16). The Commonwealth submits that not only was specific intent to kill *all* occupants demonstrated by the multiple firebombing of the small, single family dwelling house from different angles, which would be reasonably designed and calculated to totally engulf the home in flames, but the doctrine of transferred intent would extend petitioner's specific intent to kill Evelyn Pierce to include other members of the home present at the time of the firebombing.

In *People* v. *Neal,* 98 Cal. App.2d 668, 218 P.2d 556 (1950), a defendant was convicted for attempted murder of a husband and wife, by igniting gasoline in their bedroom, although his specific intent was to kill the husband only. The court employed the theory of transferred intent to convict the defendant of attempted murder of the wife. In the instant case, petitioner's firebombing of the entire house is certainly sufficient to transfer his specific intent to murder Evelyn Pierce to include other members of the household.

II.

The Evidence Was Sufficient To Sustain Petitioner's Conviction Of Possession Of A Sawed-Off Shotgun Under Circumstances Indicating Preparation For The Commission Of A Crime Of Violence.

Petitioner again challenges sufficiency of the evidence to sustain conviction, and in this instance he asserts that the evidence was insufficient on the charge of possession of a sawed-off shotgun under circumstances indicating prepara-

tion for the commission of a crime of violence. The Virginia statutes on which the Commonwealth prosecuted the petitioner were §§ 18.1-268.3 and 18.1-268.4, Code of Virginia (1950), as amended. (Reproduced in Petition at 4-5). Paragraph four of the latter section provides that possession of a sawed-off shotgun shall be presumed to be for an offensive or aggressive purpose if the gun is found in the defendant's possession and the circumstances indicate his preparation for the commission of a crime of violence.

The record shows that the petitioner brought a sawed-off shotgun with him on the night that the house was firebombed. Accomplice Darrell B. Phinney, who testified for the Commonwealth, identified the gun seized by the police as the one which petitioner had in his possession during the firebombing. After identifying the particular gun, Phinney testified that "Mr. Noll [petitioner] brought it along in the car *that night to the firebombing when we went.* And *when he . . . come* (sic) *back home he hid that* and the marijuana and the LSD he had in pills next door to his apartment, some storage shed . . . ." (Tr. at 118). (Emphasis added). Phinney later stated unequivocally that he personally saw petitioner put the shotgun in the car and that the petitioner himself informed him that he [petitioner] hid the gun "after he got back to the house." (Tr. at 120). Upon information from Phinney and another accomplice, the police discovered the shotgun five days after the arson in a storage room adjacent to petitioner's apartment. (Tr. at 169, 172).

The Commonwealth proved, as required by the statute, that petitioner was in possession of an illegal sawed-off shotgun while preparing for and during the commission of the firebombing, a crime of violence. The reasonable inference to be drawn from the petitioner's carrying of such a weapon in the time frame indicated (loading it in the car just

prior to the firebombing raid and promptly removing it from the car and hiding it following the raid) is that he planned to use it, if necessary, during the attack.

While the Commonwealth recognizes the well established rule that criminal statutes must be strictly construed, the question becomes one of semantics when attempting to discern the legislative intent under § 18.1-268.4, Code of Virginia (1950), as amended. Does the phrase "found in the possession of the individual" mean that the police must apprehend an individual with the gun in his possession at that moment and prior to the violent offense, as petitioner appears to argue, or does this phrase mean that the Commonwealth need only establish that the gun was in the accused's possession while he was preparing or committing the crime of violence? The Commonwealth submits that it is clearly the latter.

In *Carter* v. *Commonwealth*, 212 Va. 665, 187 S.E.2d 203 (1972), the Supreme Court of Virginia reversed and remanded the judgment of the trial court convicting a defendant, one Dwight Carter, of possession of a sawed-off shotgun for an offensive or aggressive purpose. In that case two men had appeared at the front of an apartment building, and one of these men (identified as the accused, Carter) was observed by a woman in the lobby to have a "pipe-like object." As the woman ran from the scene, she heard a shot. About eight days later, police officers found a sawed-off shotgun wrapped in plastic and buried under a stairway in the open yard to the rear of the residence of Carter's stepgrandfather. Hearsay evidence indicated that Carter resided there, but all direct evidence was to the contrary. Carter was not present when the gun was found, and the evidence did not reveal when he had last been there. The witness who had observed Carter with the "pipe-like object" neither

identified the shotgun as the "pipe-like object" nor was she even asked whether the shotgun resembled the "pipe-like object." The Court overturned the conviction because the evidence did not connect Carter with the shotgun buried in the rear of the residence and did not show that Carter possessed a shotgun *when he was seen at the front of the apartment building*—not because the shotgun was "found" buried rather than at that instant in the possession of Carter as he was preparing for the commission of a crime of violence in the future.

Similarly, in *Ford* v. *Commonwealth*, 215 Va. 308, 208 S.E.2d (1974), the Supreme Court of Virginia reversed a conviction for possession of a sawed-off shotgun as the circumstances did not indicate that the defendant was preparing to participate in a violent crime. The Court indicated that although the defendant was only seen with the weapon in his possession and was not arrested with it in his possession, it would have upheld the lower court's verdict if it had appeared from the circumstances that the defendant was preparing to engage in a crime of violence. Actual possession at the point of arrest is not necessary, but proof of possession at the time of preparation or commission of the violent offense is the requisite. In the case at bar, the Commonwealth provided such proof.

III.

The Evidence Was Sufficient To Sustain The Convictions Of Possession Of Marijuana And LSD, And, In This Context, The Supreme Court Of Virginia Followed Its Own Decisions And Applied The Doctrine Of Stare Decisis.

Petitioner once again attempts to elevate a challenge to sufficiency of the evidence to an issue of constitutional magnitude, this time by arguing that petitioner has been denied

due process and equal protection because the Virginia Supreme Court allegedly did not follow its own decisions and ignored the doctrine of *stare decisis* when it affirmed his convictions for possession of marijuana and LSD.

Petitioner cites *Ritter* v. *Commonwealth*, 210 Va. 732, 173 S.E.2d 799 (1970), for various points of Virginia law, including that (1) it is generally necessary to show that an accused was aware of the presence and character of the particular controlled substance and was intentionally and consciously in possession of it, (2) possession need not always be exclusive but may be shared with one or more other persons, (3) duration of the possession is immaterial and possession need not always be actual possession, and (4) the accused may be shown to have had constructive possession by establishing that the drugs involved were subject to his dominion or control. Petitioner then cites *Huvar* v. *Commonwealth*, 212 Va. 667, 187 S.E.2d 177 (1972), for the proposition that mere presence of an individual, who was present along with other persons, at a location where illegal drugs or narcotics were found, was not sufficient to convict him of actual or constructive possession of the drugs found there. In *Huvar*, the accused "made no statement, committed no act and indulged in no conduct from which the inference could be fairly drawn that he possessed or controlled the drugs which the police found." 212 Va. 667, 668, 187 S.E.2d 177, 179.

The Commonwealth certainly has no quarrel with the aforesaid points of Virginia law, and the Supreme Court of Virginia did not refuse to apply any of those evidentiary principles which were pertinent to the instant case. The record reveals that witness Phinney saw the petitioner in possession of marijuana and LSD, along with the sawed-off shotgun, on the night that the firebombing occurred. (Tr.

at 118). Also, while Phinney was in jail with the petitioner, following their arrest for the firebombing, he was told by the petitioner that he [petitioner] had hidden these drugs in a storeroom adjacent to petitioner's apartment. (Tr. at 120). In addition to this evidence, it was established that in the bag containing the marijuana and LSD, which was found by police in the storeroom, there was a cold cream jar containing a quarter ounce of marijuana. The petitioner's fingerprint was found on this jar. (Tr. at 193-194). The Commonwealth established that the petitioner had hidden the drugs in the storeroom where they were found by the police, and only the petitioner's accomplices, who were in jail, were aware that the drugs were in the storeroom. The record reveals that only William Martin, the owner of the apartments and storeroom, had regular access to this room, and he was not aware that the drugs had been hidden there. (Tr. at 174, 182, 185).

Petitioner virtually ignores the evidence of the admissions and statements of the petitioner regarding the marijuana and LSD, and he asserts that "there was no evidence introduced at trial which would establish that Noll [petitioner] ever had exclusive or actual possession of the narcotics." (Petition at 25). Petitioner focuses his attention on the fingerprint evidence and quotes some language from *Williams* v. *Commonwealth*, 212 Va. 818, 188 S.E.2d 79 (1972), out of its factual context. In *Williams* the *only* evidence linking the accused to the crime of breaking and entering an appliance store consisted of his fingerprints found on a television set stolen from the showroom of the store on the night of the crime. The accused testified that one or two days before the crime was committed, he had gone into the store during business hours because he was interested in buying a television set and at that time he

touched a number of sets. The proprietor of the store thought that he had seen the accused in his store at some indeterminate time before the crime was committed. In the *Williams* decision, the Supreme Court of Virginia observed that in *Avent* v. *Commonwealth,* 209 Va. 474, 164 S.E.2d 655 (1968), it held the defendant's fingerprints sufficient to support a conviction of burglary of a storeroom, but the Court noted that in *Avent* the prints were found on a window of the storeroom that was not readily accessible to the public and at a place where the defendant had no legitimate reason to be—facts which the *Avent* opinion emphasized.

The case at bar is patently distinguishable from the situation in *Williams* where the *only* evidence was the fingerprints found on the television set that had been on display in the store's public showroom. The Commonwealth submits that the Supreme Court of Virginia did not fail to apply its own decisions, and there clearly was no denial of due process or equal protection of the law.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANTHONY F. TROY
Attorney General of Virginia

JERRY P. SLONAKER
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Jerry P. Slonaker, Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 1st day of March, 1977, I mailed three copies of the foregoing brief for the respondent in opposition to the granting of a writ of certiorari to Stanley E. Sacks, Esquire, Sacks, Sacks & Tavass, First and Merchants National Bank Building, Norfolk, Virginia 23510, counsel of record for petitioner.

JERRY P. SLONAKER
Assistant Attorney General